

104 FERC ¶ 61,151
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Vermont Electric Generation &
Transmission Cooperative, Inc.,
and North Hartland, LLC

Project No. 2816-020

ORDER AMENDING LICENSE

(Issued July 28, 2003)

1. This order grants an application by the licensee and pending transferee of the North Hartland Hydroelectric Project No. 2816 to amend the project license to add a seven-mile long primary transmission line.¹

BACKGROUND

2. In 1981 the Commission issued to Vermont Electric Cooperative, Inc. (VEC) a 40-year license for the construction and operation of the 4-megawatt (MW) North Hartland Project, located at the U.S. Army Corps of Engineers' (Corps) North Hartland Dam on the Ottauquechee River in Windsor County, Vermont.² In 1983, the Commission approved transfer of the project license from VEC to Vermont Electric Generation & Transmission Cooperative, Inc. (VEGT).³

3. The project comprises an outlet conduit at the federal dam, a 470-foot-long penstock leading from the outlet to the project powerhouse, a 400-foot-long tailrace, and appurtenant facilities. As licensed, the project also included a proposed 1/4-mile long, 12.5-kilovolt (kV) transmission line extending south from the project's switchyard and

¹In a related filing in Docket No. EL03-51, filed January 15, 2003, the applicants have requested a declaratory order finding that certain tariff and interconnection charges do not apply to the proposed transmission line. That request will be decided in a separate order.

²17 FERC ¶ 62,307 (1981).

³23 FERC ¶ 61,174 (1983).

connecting to the distribution system of Green Mountain Power Corporation.⁴ However, before constructing the line, VEGT revised the location and configuration of the line to interconnect with the distribution system of Central Vermont Public Service Corporation (Central Vermont).⁵ VEGT buried the first 600 or so feet of line from the powerhouse, then constructed a 4,000-foot above-ground line to pole 115 of Central Vermont Distribution Line 66. Pursuant to a 1984 agreement with VEGT,⁶ Central Vermont reconstructed a six-mile segment of Line 66 to transmit the project's power from pole 115 to Central Vermont's Quechee substation, and reconstructed the substation to accommodate the new three-phase circuit.⁷ Under the agreement, VEGT reimbursed Central Vermont for this work, and Central Vermont retained title to, operated, and maintained the six-mile segment of Line 66.

4. In 1988, VEGT filed the project as-built exhibits,⁸ including drawings that showed a portion of the VEGT-constructed 4,000-foot line, with notations indicating the line's eventual connection to Central Vermont's Line 66 and its termination point at the Quechee substation.⁹

5. In 1996, VEGT ceased project operations and filed for bankruptcy under Chapter 7 of the Bankruptcy Code. In 2000, pursuant to a stipulated settlement of claims approved by the bankruptcy court, the U.S. Department of Agriculture's Rural Utilities Service,

⁴17 FERC ¶ 62,307 at 63,528.

⁵VEGT made these changes because it determined that reconstructing Green Mountain Power's system for the project's transmission line would cost more than reconstructing Central Vermont's line, and using Central Vermont's transmission system would reach more of VEGT's service area. See the October 12, 1983 letter from VEGT to the Corps, included in Exhibit B of the December 20, 2002 amendment application.

⁶The agreement, dated March 22, 1984, is included in Exhibit D of the December 20, 2002 amendment application.

⁷This included the installation of new circuit breakers and meters for measuring the project's output.

⁸These were required by Article 35 of the license, 17 FERC ¶ 62,307 at 63,529.

⁹See Figure F 1-1, Site Plan & General Arrangement, attached to VEGT's transmittal letter, dated March 24, 1988, and received by the Commission's New York Regional Office on April 4, 1988 (April 1988 filing).

VEGT's primary secured creditor, negotiated the sale of the project to North Hartland, LLC (North Hartland). The sale of the project and the transfer of the project's license were approved by the Commission that same year.¹⁰ Consummation of the project sale has been delayed for a variety of reasons, including the instant amendment proceeding.

6. On December 20, 2002, VEGT and North Hartland (Applicants) filed an application to amend the license to "correct[] errors and omissions" in the 1988 as-built drawings approved by the Commission.¹¹ Specifically, Applicants want an amendment "clarifying" that the entire 7-mile length of transmission line extending from the project powerhouse to the Quechee Substation is a primary transmission line for licensing purposes and has in fact been approved as part of the license. They also request a Commission determination that, if six miles of this line are in fact owned by Central Vermont, then VEGT violated its license, notably Article 5, for failing to acquire and hold rights sufficient to operate and maintain this project work.

7. The Commission issued public notice of Applicants' amendment application on January 16, 2003, setting February 18, 2003, as the deadline for filing motions to intervene, comments, and protests. On February 19, 2003, the Vermont Department of Public Service (Vermont DPS) and Central Vermont each filed late motions to intervene, which were granted over applicants' opposition by unpublished notice issued March 14, 2003.¹² Vermont DPS took no position on the application. Central Vermont opposes the

¹⁰91 FERC ¶ 62,227 (2000). Approval of the transfer is subject to North Hartland filing a form accepting the findings in the transfer order and filing copies of conveyance documents showing the transfer of title of the properties under the license and delivery of all license instruments to the transferee. North Hartland has accepted the transfer order, but it has requested and received a series of extensions of the deadline to complete the transfer. Pursuant to an unpublished order issued March 24, 2003, the deadline is currently September 26, 2003.

¹¹December 20, 2002 filing at 2.

¹²Applicants (amendment application at 12) and separately North Hartland (motion filed May 7, 2003) request summary disposition of this proceeding, invoking Rules 217, 710, and 801 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.217, 385.710, and 385.801 (2003). Rule 710 applies only in proceedings before an administrative law judge. Rule 801 requires the parties to waive their right to a hearing, which, as described next, Central Vermont does not. Rule 217 requires the decisional authority's determination that there are no genuine issues of fact material to the decision.

(continued...)

application and argues that the six-mile segment of the proposed transmission line between pole 115 and the Quechee substation is part of its distribution system, and should not be included in the license. The Department of the Interior filed a letter on February 19, 2003, stating that it had no comments on the amendment application.

DISCUSSION

A. The three-phase circuit on Line 66 is a part of the project's primary transmission line under FPA Part I

8. Section 4(e) of the FPA, 16 U.S.C. §797(e), authorizes the Commission to "issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, powerhouses, transmission lines, or other project works necessary or convenient for the development, transportation, and utilization of power" Project works are the physical structures of a project.¹³ FPA Section 3(11) defines a "project" as a complete unit of hydropower development, including:

the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system[.¹⁴]

¹²(...continued)

In its February 19, 2003 motion to intervene and its May 22, 2003 reply to Applicants' May 7 motion, Central Vermont agrees that the Commission may properly dispose of Applicants' amendment application summarily, so long as it denies the application; otherwise, Central Vermont asks the Commission to set the matter for a trial-type evidentiary hearing. Because we conclude that there are no genuine issues of material fact that cannot be appropriately decided on the written record, we deny Central Vermont's motion. Applicants' motions for summary disposition, as well as North Hartlands's June 17, 2003 motion for fast-track processing and a status report, are mooted by this order.

¹³FPA Section 3(12), 16 U.S.C. § 796(12).

¹⁴FPA Section 3(11), 16 U.S.C. § 796(11). This provision states in its entirety:

"[P]roject" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit,

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The Commission's test for a primary line is that the line is used solely to transmit power from the licensed project to a load center, and that without the line there would be no way to transmit all the project power to market.¹⁵ Under this test, the line leading from a project ceases to be a primary line at the point it is no longer used solely to transmit power from the project to the interconnected grid.

9. As noted, pursuant to its 1984 agreement with VEGT to transmit project power to the Quechee substation, Central Vermont reconstructed a six-mile segment of its Distribution Line 66. Specifically, it installed new, taller wooden poles, to which it attached its pre-existing single-phase electrical distribution circuit (serving retail customers) and a physically separate three-phase circuit to transmit the project's power.

10. Central Vermont contends that because the six-mile segment of Line 66 carries both the project-dedicated three-phase circuit and the single-phase distribution circuit, and because the three-phase circuit could one day serve both the project and a distribution function, the segment should be considered a distribution line, leaving as the project's primary line only the section between the powerhouse and pole 115 on Line 66.

11. That the three-phase circuit may at some point be used for distribution does not affect its current status. Moreover, Central Vermont allows that the Commission could consider the project-dedicated three-phase circuit as by itself constituting a primary transmission line,¹⁶ although it argues that this would be unprecedented and would require a determination of what part of the shared poles and rights-of-way the licensee would have to obtain adequate property rights for, and how the licensee and Central Power would divide maintenance and other responsibilities of these shared items. We do

¹⁴(...continued)

and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit[.]

¹⁵See, e.g., New York Power Authority, 98 FERC ¶ 61,033(2002); Pacific Gas and Electric Co., 85 FERC ¶ 61,411 (1998).

¹⁶February 19, 2003 protest at 21.

not find such an allocation overly complex. The licensee does not need to hold fee title in the transmission facilities in question; it is sufficient that it hold a lease or easement giving it the right to use the relevant facilities for project purposes during the term of the license, with an option to renew the lease for any new license that is issued for the project. This has for years been an approved approach to allow licensees to use various project facilities without having to acquire them outright.¹⁷

12. Taking a different tack, Central Vermont argues that Line 66 is not a primary line, in that the licensee has never had problems getting project power to the grid, and because under FERC Order No. 888 Central Vermont is in any event required to provide open-access, non-discriminatory service under FERC-filed rate tariffs.¹⁸ However, the determination of whether a transmission line is primary for FPA Part I purposes rests on physical feasibility, not contractual or economic feasibility. While Central Vermont's reasoning may have merit, it is for the Congress, not this Commission, to revise or remove the "primary transmission line" element of the statutory definition of a project under FPA Part I.¹⁹

13. Central Vermont next asserts that the Commission has impliedly found the six-mile segment of Line 66 not to constitute a primary line, inasmuch as it has never

¹⁷See, e.g., New York State Electric & Gas Corp., 16 FERC ¶ 61,176 (1981) and Pennsylvania Hydroelectric Development Corp., 44 FERC ¶ 61,252 at 61,926-27 (1988) (lease to use state-owned dam for project purposes); Allegheny Hydro No. 8, L.P., 53 FERC ¶ 61,446 (1990) (lease of entire project); International Paper Company and Turners Falls Hydro LLC, 100 FERC ¶ 61,114 (2002) (boundary line around project generating equipment includes "the walls of adjacent buildings and rooms necessary for structural support and for access to the licensed equipment and facilities for all operation and maintenance purposes:" licensee and buildings' owner "executed an agreement in which they exchanged cross-easements for such things as structural support and wiring and utilities").

¹⁸February 19, 2003 protest at 4, 17.

¹⁹The Commission does not have the discretion to waive the licensing of jurisdictional project works. See, e.g., New York State Electric & Gas Corp., *supra*, 16 FERC ¶ 61,176 at 61,393-95 (Commission declined to exclude state-owned dam from the license despite its unexplained failure to include New York State-owned facilities in earlier licenses).

previously required it to be licensed.²⁰ To the extent Central Vermont is suggesting that the Commission is somehow estopped by parties' reliance on the line's non-licensed history from now finding the line to be a project work, we do not find that this is a situation where estoppel lies against the government.²¹ Indeed, every year the Commission makes findings as to whether it has mandatory licensing jurisdiction over various unlicensed operating hydroelectric projects, some of which it has never examined and even a few it or its predecessor, the Federal Power Commission, had previously found non-jurisdictional.

14. In sum, we hold that the primary transmission line of the North Hartland Project comprises the 600 feet of buried line, the 4,000-foot above-ground line to pole 115, and the approximately six-mile length of the three-phase circuit attached to Vermont Electric's Line 66 from pole 115 to its Quechee Substation.²²

B. The entire seven-mile primary line is not currently licensed

15. As noted, Applicants seek an amendment "clarifying" that the entire above-described 7-mile primary transmission line has in fact been approved as part of the license. However, the 1988 as-built exhibit on which they rely does not support their position. The exhibit's project boundary map (Fig. G2-1) is unambiguous²³ and does not

²⁰Central Vermont also argues that neither it nor VEGT ever intended the segment to be a primary line. However, the determination of a primary line is one of function, not intent.

²¹See discussion of estoppel against the government in UAH-Braendly Hydro Associates, 47 FERC ¶ 61,448 (1989).

²²Applicants' amendment application attaches, at Appendix C, a December 28, 2001 "Interim Order Re: Interconnection Issues," issued by a hearing officer of the Vermont Public Service Board) finding, inter alia, that the point of interconnection between the North Hartland Project and Central Vermont's distribution system is the Quechee Substation. In its February 19, 2003 protest (at 35), Central Vermont moves to strike the interim order, noting that the Board later issued an order finding that the interim order has no precedential value. We see no need to strike Appendix C; we have made our determination based on the facts described herein and pursuant to FPA standards.

²³Applicants' reliance on the 1988 Exhibit F1-1, Site Plan & General Arrangement, does not help them, because it is not the purpose of that exhibit to show the project
(continued...)

include any part of Line 66, or apparently even the entire 4,000-foot line connecting to it,²⁴ within the project boundary line.²⁵ In approving the as-built exhibits, the May 10, 1988 order stated that "the constructed project works do not differ significantly from the design approved in the license."²⁶ This is a reasonable statement in light of the 1988 boundary map; it would not be an accurate description of the addition of six miles of transmission line. We conclude that the license does not currently include the six miles of three-phase circuit line attached to the poles carrying Line 66 from pole to Quechee Substation.

16. Applicants' amendment application includes a series of revised or new Exhibit F drawings, including a revised project boundary map. We are approving their submittals and are amending the license to so reflect.

17. Standard license Article 5 requires licensees to acquire and retain title in fee to, or the right to use in perpetuity, project property sufficient to accomplish all project purposes.²⁷ As noted, Applicants ask that, if Central Vermont owns the six miles of

²³(...continued)
boundary.

²⁴Exhibit F1-1 (Site Plan & General Arrangement) shows a 12.5-kV power cable extending to Pole PHH 3P-1, from which point the line's continuation is identified as "new transmission line to Central Vermont Public Service." Pole PHH 3P-1 is shown as located a short distance uphill from contour elevation line 525; however, on the project boundary map elevation line 525 is well outside the boundary on that side of the project. Pole PHH 3P-1 is presumably the same as Pole OHH 3-1, identified in Applicants' amendment application, Exhibit A.4 (Primary Line & Point of Junction), as the point at which the buried 12.5 kV three-phase circuit emerges and continues above-ground.

²⁵See VEGT's April 1988 filing at Figure G 2-1, Project Boundary Map.

²⁶43 FERC ¶ 62,158 at 63,239 (1988).

²⁷Standard Article 5 states in part:

The Licensee, within five years from date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance and operation of the project. The Licensee or its successors and assigns shall, during the period of
(continued...)

project primary line on Line 66 – which it does – the Commission find that VEGT violated Article 5 of its license for failing to acquire²⁸ requisite rights to these six miles of primary line. Applicants reference the license transfer application form, 18 C.F.R. § 131.20 item (8), which provides for the transferor to certify that it "has fully complied with the terms and conditions of its license" ²⁹ It is not clear to what end Applicants seek a finding that VEGT violated license Article 5. However, what is clear is that there is no point in trying to enforce any regulatory requirements on VEGT; its project assets are held by the trustee of its bankruptcy estate, and the estate's ownership of the project is encumbered with the security interest of the Rural Utilities Service. The order approving transfer of the North Hartland Project license is contingent on transfer of title of the properties "under license."³⁰ In order not to complicate completion of the transfer, the amendment adding the currently unlicensed portions of the primary line will be made effective as of the effective date of the license transfer.³¹ Once the license transfer is

²⁷(...continued)

the license, retain the possession of all project property covered by the license as issued or as later amended, . . . and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission

See Form L-2, 54 FPC 1808, 1810 (1975), incorporated by reference in the North Hartland Project license, 17 FERC ¶ 62,307 at 63,529 ordering para. D.

²⁸We agree with Central Vermont (February 19, 2003 protest at 8-9, 28) that there is no basis for asserting that VEGT "ceded" these rights.

²⁹Amendment application at 9. Applicants also reference standard Article 6 of the license (see Form L-2, n. 27, supra) in connection with a transferor's obligation to comply with its license. Article 6, which requires a licensee to "make good any defect of title to" project property, deals with a project at the end of its license term in the event the United States takes over the project pursuant to FPA Section 14 or the license is transferred to a new licensee under FPA Section 15, neither of which is the case in the instant proceeding.

³⁰91 FERC ¶ 62,227 at 64,380, ordering para. C(1).

³¹The Commission will issue notice of that effective date.

effective,³² it will be up to the transferee/new licensee, North Hartland, to obtain the requisite rights to the entire primary line.

Finally, Central Vermont argues that Applicants' application to "clarify" the inclusion in the license of the entire primary line is "fatally flawed," inasmuch as neither VEGT nor North Hartland owns the six miles of circuitry at issue, and the Commission cannot appropriate private property by placing it under license.³³ Clearly, the inclusion of lands or facilities within a project boundary neither creates nor alters property rights.³⁴ Rather, as Central Vermont points out, the licensee must obtain such property or adequate rights therein through private contracts, or, failing that, the exercise of eminent domain authority under Section 21 of the FPA.³⁵

The Commission orders:

(A) The application filed December 20, 2002, by Vermont Electric Generation & Transmission Cooperative, Inc., by and through Mr. Gleb Glinka, trustee in bankruptcy, and North Hartland, LLC is approved as described in this order, effective on the date the license transfer is effective, and is denied in all other respects.

(B) Central Vermont Public Service Corporation's motion to hold amendment proceeding in abeyance pending completion of Alternative Dispute Resolution proceedings is denied.

³²As stated (n. 10, supra), North Hartland has obtained a series of extensions of the deadline to file copies of conveyance documents showing the transfer to it of title to the properties under the license and delivery of all license instruments. The deadline is currently September 26, 2003. We note that any further requests to extend the deadline will be carefully reviewed to determine whether there remain legal impediments to transfer of property title, or whether North Hartland seeks further extensions while it pursues modification or reversal of conditions applicable to authorizations to obtain the project property or of contractual issues involving transmission and sale of project power. It is not in the public interest for the North Hartland Project to remain in its current limbo.

³³February 19, 2003 protest at 28.

³⁴See, e.g., Niagara Mohawk Power Corp., 77 FERC ¶ 61,306 at 62,391 (1996).

³⁵Alternatively, Central Vermont could apply for a transmission-line-only license for the six-mile segment of three-circuit line (see 18 C.F.R. § 4.70) or could apply to become co-licensee of the North Hartland Project.

(C) Central Vermont Public Service Corporation's request for an evidentiary, trial-type hearing is denied.

(D) Central Vermont Public Service Corporation's motion to strike Exhibit C of the December 20, 2002 amendment application is denied.

(E) The parties' motions for summary disposition and for fast-track processing are dismissed as moot.

(F) Ordering paragraph (B)(2), item (7), of the license for the North Hartland Project license, 17 FERC ¶ 62,307 at 63,528 (1981), is amended to read as follows:

(7) a transmission line that comprises: (a) an approximately 600-foot underground segment of 12.5-kV, three-phase line from the project's substation to the riser pole owned by the New England Telephone Company(NET); (b) approximately 4,000 feet of 12.5-kV, three-phase line in NET's existing right-of-way from the riser pole to a junction with Central Vermont Public Service Corporation's (Central Vermont) utility system at Pole # 115 on Clay Hill Road; and (c) approximately six miles of 12.5-kV, three-phase line mounted on top of Central Vermont's distribution line (Line 66) along Clay Hill Road to Central Vermont's Quechee Substation;

(G) The following exhibits filed on December 20, 2002, are approved and made part of the license:

Approved Exhibit	Title	FERC Drawing No.	Superseded Drawing No.
A5 -1	Single Line Diagram	2816-21	2816-11
F1 -1	Site Plan and General Arrangement	2816-22	2816-12
G1 -1	Project Location Map	2816-23	2816-18 & 19
G2 -1	Project Boundary Map	2816-24	2816-20
G2 -2	Project Boundary Map	2816-25	--

Superseded Drawings are eliminated from the license.

(H) Within 90 days of the date of issuance of this order, the licensee shall file three original sets of aperture cards of the approved drawing reproduced on silver or gelatin 35 mm microfilm. All microfilm should be mounted on Type D (3¼" x 7d") aperture cards. Prior to microfilming, the FERC Drawing Number (2816-21 through 25) shall be shown in the margin below the title block of the approved drawing. After mounting, the FERC Drawing Number shall be typed in the upper right corner of each aperture card. Additionally, the Project Number, FERC exhibit (A5-1, G1 through G2), Drawing Title, and date of this order shall be typed in the upper left corner of each aperture card. Two sets of aperture cards shall be filed with the Secretary of the Commission. The third set of aperture cards shall be filed with the Commission's New York Regional Office.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.